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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER THOMAS BABICH, Defendant and Appellant.	H040638 (Santa Clara County Super. Ct. No. C1360651)

I. INTRODUCTION

Defendant Christopher Thomas Babich appeals after a jury convicted him of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 1) and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364.1; count 2). The trial court sentenced defendant to a two-year county jail term for count 1 with a one-year concurrent term for count 2.

On appeal, defendant contends the trial court erred by: (1) denying his motion to suppress as untimely; (2) admitting a statement that defendant made at the time of his arrest for its truth, rather than for impeachment of the arresting officers; and (3) failing to instruct the jury that defendant's prior convictions could not be used to infer criminal disposition or propensity. Defendant also contends his trial counsel was ineffective for failing to request a limiting instruction regarding his prior convictions and for failing to

timely file a motion to suppress. For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

On June 28, 2013, at about 7:19 p.m., San Jose Police Officer John Prim was on foot patrol along with Officer Kevin McLean, who was in the field training program. The officers were patrolling in an area near a creek and a railroad overpass where narcotics activity sometimes took place, and which they reached by going through two fences. The officers saw defendant in the area, and they decided to detain him because he was trespassing on "waterway property as well as railroad property." Officer McLean approached defendant while Officer Prim stood about 20 feet away.

As Officer McLean approached defendant, defendant made "a quick hand motion" with his left hand, as if he was throwing an object. Officer McLean ordered defendant to come towards him. He then advised Officer Prim that defendant had dropped something. Officer McLean noticed that defendant had something clenched in his right hand. He asked defendant to drop the object and defendant complied. The object was a glass pipe, which broke when it hit the ground.

Officer Prim went to the area where defendant had made the hand motion. He found a green Listerine strip container, picked it up, and brought it to Officer McLean. Officer McLean did not recall whether defendant said anything at that point, but according to Officer Prim, defendant stated, "That isn't mine." Officer McLean opened the container, which contained a small but useable amount of methamphetamine.

Officer McLean handcuffed defendant and walked defendant to the patrol car. Defendant begged "not to be arrested," saying that "it was only a usable amount and that he was a drug addict."

At trial, the jury learned that defendant was convicted of providing false information to a police officer (Pen. Code, § 148.9) in 2010, 2012, and 2013, and that

defendant was convicted of possession for sale of a controlled substance (Health & Saf. Code, § 11378) in 2006.

The jury convicted defendant of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 1) and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364.1; count 2). The trial court sentenced defendant to a two-year county jail term for count 1 with a one-year concurrent term for count 2.

III. DISCUSSION

A. Denial of Motion to Suppress

Defendant contends the trial court erred by denying his motion to suppress as untimely. Alternatively, defendant contends his trial counsel was ineffective for failing to timely file the motion.

1. Proceedings Below

Defendant's preliminary hearing was held on August 13, 2013, and the transcript was filed on August 19, 2013. Defendant was arraigned on the information on August 26, 2013, at which time he declined to waive his speedy trial rights. Defendant's case was set for the master trial calendar on October 7, 2013.

On October 7, 2013, the first day of trial, defendant's trial counsel indicated she was going to file a motion to suppress. (See Pen. Code, § 1538.5, subd. (a).) The next day, October 8, 2013, defendant filed the motion, in which he argued that he was detained without reasonable suspicion. Defendant acknowledged that as provided in Penal Code 1538.5, subdivision (h), a motion to suppress can be heard during trial only if a prior "opportunity for th[e] motion did not exist or the defendant was not aware of the grounds for the motion."

In an accompanying declaration, defendant's trial counsel, an attorney with the Public Defender's Office, explained that she had been assigned to the case after the

preliminary hearing and before the August 26, 2013 arraignment, and that she had received the preliminary hearing transcript "shortly before September 17, 2013." She also acknowledged that the trial court had ordered all pretrial motions to be filed by September 10, 2013. When she reviewed the preliminary hearing transcript on September 17, 2013, she discovered that the preliminary hearing testimony was different from the police reports, and that it "gave rise to a colorable suppression motion." Defendant's trial counsel then submitted the case for review by the Public Defender's research department. On September 27, 2013, the research department told her that there was an arguable motion to suppress but that defendant needed to waive his speedy trial rights in order for the motion to be timely. Defendant was unwilling to waive his speedy trial rights.

At the October 8, 2013 hearing on motions in limine, the trial court denied defendant's motion to suppress as untimely. The trial court found that the delay in discovering the basis for the motion was not justified, citing *People v. Frazier* (2005) 128 Cal.App.4th 807 (*Frazier*).

2. Analysis

Penal Code section 1538.5, subdivision (h) provides "a narrowly circumscribed exception" to the rule that a defendant "is not permitted to raise search and seizure issues for the first time at trial." (*People v. Brooks* (1980) 26 Cal.3d 471, 476.) Under that subdivision, an untimely motion to suppress can be brought if there is "an intervening change in the applicable law or the discovery of new evidence in support of suppression." (*People v. Superior Court* (1971) 4 Cal.3d 605, 611.)

The defendant in *People v. Burke* (1974) 38 Cal.App.3d 708 (*Burke*) brought a motion to suppress during trial. His trial attorney had been involved in the case for two months before the defendant's trial, and he asserted "that there had been no opportunity to make the motion earlier because of delay in discovering the relevant facts." (*Id.* at p. 713.) The trial court "denied the motion on the grounds that there had been ample time

for counsel to make the motion before trial." (*Ibid.*) The appellate court upheld that ruling, noting that "[t]he procedural scheme established by Penal Code section 1538.5 displays a strong legislative preference for litigating prior to trial the legality of searches and seizures" and that "[n]o persuasive justification for the delay was presented." (*Ibid.*)

A suppression motion brought midtrial was deemed untimely in *People v. Martinez* (1975) 14 Cal.3d 533 (*Martinez*). The defendant claimed the motion should have been heard pursuant to Penal Code section 1538.5, subdivision (h) because his trial counsel had been "unaware of the grounds for suppression" until after an officer's testimony during trial. (*Martinez, supra,* at p. 537.) The California Supreme Court rejected the claim, explaining that trial counsel's "access to information concerning the case" was not limited to the transcript of the preliminary hearing; trial counsel "could have learned the grounds for a pretrial suppression motion by simply interviewing his client." (*Ibid*., fn. omitted.)

In *Frazier,* the case cited by the trial court, the defendant brought a motion to suppress evidence on the first day of trial. (*Frazier, supra,* 128 Cal.App.4th at p. 829.) The defendant's trial counsel alleged that he " 'was previously unaware of the grounds for bringing th[e] motion, and no opportunity existed prior to trial to bring the motion,' " because he had entered the case only two months before trial. (*Ibid.*) The trial court found that the motion was untimely, reasoning that while " 'the particular trial counsel may have come in late, . . . the evidence itself appears to have been known to the Defense or should have been known. The facts are not new.' " (*Ibid.*) The Court of Appeal affirmed, finding that the defendant had "presented no persuasive justification for the delay in bringing the motion." (*Ibid.*) The court noted that the facts regarding the searches were "within the knowledge of defendant" and that "allowing the knowledge of the defense to be assessed based on the knowledge of new counsel alone will encourage gamesmanship in the use of substituted counsel and the delay of trials." (*Ibid.*)

Defendant contends his trial counsel made a more detailed showing of justification than the attorney in *Frazier*. We disagree. Defendant's trial counsel did not explain why she did not receive and review the preliminary hearing transcript prior to September 17, 2013, which was more than three weeks after the August 26, 2013 arraignment. Further, she acknowledged knowing that pretrial motions were due on September 10, 2013. Additionally, defendant's trial counsel did not explain why she could not have obtained the information supporting the suppression motion earlier, from defendant. (See *Martinez, supra,* 14 Cal.3d at p. 537.) As in both *Burke* and *Frazier*, defendant's trial counsel had been assigned the case two months before trial, and she "presented no persuasive justification for the delay in bringing the motion." (*Frazier, supra,* 128 Cal.App.4th at p. 829.)

Defendant also contends that the *Frazier* court's "fear of 'encouraging gamesmanship' " does not adequately take into account "the reality of those who work as deputy public defenders." However, defendant's trial counsel did not specify that a heavy caseload was the reason she delayed reading the preliminary hearing transcript.

Defendant next contends that *Frazier* erroneously allows a prior attorney's knowledge of facts to be imputed to subsequent trial counsel. He argues that Penal Code section 1538.5, subdivision (h) contemplates actual awareness, since it provides that a motion to suppress can be heard during trial if " 'opportunity for the motion did not exist or the defendant *was not aware of the grounds for the motion*.' " We do not believe that the statute precludes a prior attorney's knowledge of facts from being imputed to trial counsel, particularly since information supporting a suppression motion will often come from the defendant. (See *Frazier, supra,* 128 Cal.App.4th at p. 829; *Martinez, supra,* 14 Cal.3d at p. 537.) In this case, the justification for imputing knowledge is particularly strong, since defendant was represented by another attorney from the same Public Defender's office during the preliminary hearing.

Finally, defendant asserts that a hearing on the motion to suppress would have been brief and could have been heard before the jury was impaneled and sworn in. However, the length of a suppression motion hearing is not one of the considerations specified by Penal Code section 1538.5, subdivision (h).

In sum, under the circumstances and based on the cases discussed above, the trial court did not err by denying defendant's motion to suppress as untimely.

3. Ineffective Assistance of Counsel

We next address defendant's alternative claim that if his motion to suppress was properly denied as untimely, his trial counsel rendered ineffective assistance by failing to file a timely motion.

In order to establish that trial counsel was ineffective, defendant must show (1) that counsel's performance was deficient because it was not "the result of reasonable professional judgment" and "outside the wide range of professionally competent assistance" (*Strickland v. Washington* (1984) 466 U.S. 668, 690 (*Strickland*)) and (2) prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at p. 694). "When a defendant claims ineffective assistance of counsel based on his [or her] counsel's failure to bring a motion to suppress evidence on Fourth Amendment grounds, the defendant is required to show that the Fourth Amendment claim had merit. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 989 (*Frye*), disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) In the motion to suppress filed below, defendant argued that the officers "did not have reasonable suspicion to believe that [defendant] had committed any crime at the time of

his detention." Defendant claimed that he had not been trespassing "as there were no signs indicating that the undercrossing was private property, a necessary element to a trespassing charge." Defendant also noted that, at the preliminary hearing, Officer McLean had testified that defendant "made a motion with his hand" and appeared to discard an object, but that he had not actually seen any item being discarded.

On appeal, defendant contends that his motion to suppress had merit because the officers had no reasonable suspicion that he was trespassing at the time of his detention. He repeats his trial counsel's assertion that there were no posted signs forbidding trespassing at the property. As defendant notes, Penal Code section 555 provides: "It is unlawful to enter or remain upon any posted property without the written permission of the owner, tenant, or occupant in legal possession or control thereof." (See also Pen. Code, §§ 553-554.1; *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [posting is an element of the offense].)

As the detention issue was never litigated below, the record does not contain any information concerning the presence or absence of signs forbidding trespassing. On this record, we do not know what the officers would have said had they been asked at a suppression hearing whether or not there were signs posted in the area. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) Thus, resolution of this issue depends on facts outside the record, and the claim is more appropriately brought in a petition for writ of habeas corpus. (See *ibid.*)

But even if defendant had presented evidence that he was not trespassing, it is not reasonably probable that his suppression motion would have been granted. (See *Strickland*, *supra*, 466 U.S. at p. 694; *Frye*, *supra*, 18 Cal.4th at p. 989.) According to the trial testimony, defendant's detention "occurred in a 'high crime area,' " which is "among the relevant contextual considerations" to be considered. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124.) In addition, "upon noticing the police," defendant appeared to discard an object. (*Ibid.*) Flight and other such "nervous, evasive behavior is a

pertinent factor in determining reasonable suspicion." (*Ibid.*) These specific facts, considered in light of the totality of the circumstances, provided some objective manifestation that defendant might be involved in criminal activity. (See *Souza*, *supra*, 9 Cal.4th at p. 231.) Thus, defendant's motion to suppress lacked merit, and defendant's trial counsel was not ineffective for failing to bring the motion in a timely manner.

B. Admission of Defendant's Statement/Impeachment With Prior Convictions

Defendant contends the trial court erred by admitting a statement that he made at the time of his arrest for its truth, rather than for impeachment of the arresting officers, and then allowing the prosecution to impeach him with his prior convictions.

1. Proceedings Below

Defendant filed a motion in limine seeking to exclude the use of his prior convictions for impeachment if he testified. He listed three misdemeanor convictions of providing false information to a police officer (Pen. Code, § 148.9), two felony convictions of possession for sale of a controlled substance (Health & Saf. Code, § 11378), and misdemeanor convictions of battery (Pen. Code, §§ 242/243, subd. (e)), false imprisonment (Pen. Code, §§ 236/237), commercial burglary (Pen. Code, §§ 459, 460, subd. (b)), and evading a police officer (Veh. Code, § 2800.2). In a supplemental motion in limine, defendant sought to preclude the prosecution from using any of his prior convictions pursuant to Evidence Code section 1101, subdivision (b).

The prosecution filed a motion in limine seeking to admit defendant's three prior convictions of possession of methamphetamine (Health & Saf. Code, § 11377) to show defendant's knowledge (Evid. Code, § 1101, subd. (b)) of the fact that the substance in the present case was a controlled substance. The prosecution also sought to admit those and other prior convictions for impeachment if defendant testified. The prosecution listed most of the prior convictions listed in defendant's motion, plus several others, including a fourth prior conviction of providing false information to a police officer

(Pen. Code, § 148.9) and a prior conviction of bringing a controlled substance into jail (Pen. Code, § 4573.8).

The trial court denied the prosecution's request to introduce defendant's prior convictions of possession of methamphetamine (Health & Saf. Code, § 11377) to show knowledge, but the court indicated that the ruling could be reconsidered "if the defense opens the door and makes knowledge an issue."

The trial court ruled that defendant's three most recent misdemeanor convictions of providing false information to a police officer (Pen. Code, § 148.9) could be used for impeachment if defendant testified. The trial court further ruled that one of defendant's prior convictions of possession for sale of a controlled substance (Health & Saf. Code, § 11378) could be used for impeachment, but that it would be sanitized so the jury would not learn that the substance was methamphetamine. The trial court ruled that none of defendant's other prior convictions could be used for impeachment and that the jury would receive a limiting instruction regarding the prior convictions.

Following jury selection and the initial jury instructions, defendant's trial counsel informed the trial court that she had just received information from the prosecution regarding a statement made by Officer Prim. At the time of defendant's arrest, Officer Prim had heard defendant say, "That's not mine," or "That isn't mine. I swear." Defendant's trial counsel argued that these statements should be admitted pursuant to Evidence Code section 356, since the prosecution was seeking to admit other statements defendant made at the time of his arrest.[1] Defendant's trial counsel also asked that the statements be admitted for impeachment of Officer McLean.

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[1] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Defendant's trial counsel argued that if the trial court admitted defendant's statements denying that the methamphetamine belonged to him, and defendant himself did not testify, the prosecutor should not be permitted to impeach defendant with his prior convictions. Defendant's trial counsel argued that the statements were not being offered for their truth but rather to explain and put into context the "vague statements" that were coming in through Officer McLean. Defendant's trial counsel suggested the trial court could give a limiting instruction to avoid any prejudice.

The prosecutor argued that defendant's statements denying that the methamphetamine belonged to him were not admissible to impeach Officer McLean because they were not Officer McLean's prior inconsistent statements. The prosecutor also argued that the statements did not impeach Officer McLean's testimony because Officer McLean had testified that he did not recall any conversation with defendant. As to defendant's argument that the statements were admissible pursuant to Evidence Code section 356, the prosecutor argued that if the defense put the statements into evidence, the prosecution would have the right to challenge defendant's credibility "as if he testified" by impeaching him.

The trial court agreed that defendant's statement denying that the methamphetamine belonged to him was not a prior inconsistent statement of Officer McLean or of defendant. However, the trial court found that the statement was admissible under Evidence Code section 356. The trial court further found that if the statement was introduced, defendant could be impeached with his prior convictions even if he did not testify.

On cross-examination, Officer Prim testified that defendant stated, "That isn't mine," when Officer Prim brought the container of methamphetamine over to Officer McLean. As noted above, four of defendant's prior convictions were subsequently introduced into evidence: three convictions of providing false information

to a police officer (Pen. Code, § 148.9) and one conviction of possession for sale of a controlled substance (Health & Saf. Code, § 11378).

2. Analysis

"We review the trial court's rulings on the admission of evidence for abuse of discretion. [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 462.)

In *People v. Jacobs* (2000) 78 Cal.App.4th 1444 (*Jacobs*), the court held that "a defendant's prior felony convictions are admissible under Evidence Code sections 1202 and 788 to attack his credibility when, at his own request, his exculpatory statement to the police is admitted into evidence, but he does not testify at trial." (*Id.* at p. 1446, fn. omitted.)

In *Jacobs*, the defendant (Jacobs) was convicted of receiving stolen property. (*Jacobs, supra,* 78 Cal.App.4th at p. 1446.) Prior to trial, his codefendant sought to admit part of a statement Jacobs had made to the police, in which Jacobs had admitted owning the vehicle in which the stolen items were located. Jacobs objected, asking that the trial court instead admit his whole statement, including the portion in which he described how he came into possession of the stolen items. After the whole statement was admitted, the trial court allowed the prosecution to impeach Jacobs's hearsay statement by introducing evidence of several of his prior felony convictions. On appeal, Jacobs contended that the trial court's ruling was prejudicial error. (*Ibid.*)

In upholding the trial court's ruling, the appellate court in *Jacobs* noted that Evidence Code section 788 "permits an attack on a witness's credibility by introduction of evidence of his or her having been convicted of a felony." (*Jacobs, supra,* 78 Cal.App.4th at p. 1449, fn. omitted.) The court also cited to Evidence Code section 1202, which permits evidence of a hearsay declarant's statement or other conduct that is inconsistent with the evidence presented by the declarant to be introduced to attack the declarant's credibility. (*Ibid.*) Evidence Code section 1202 also provides: "Any other

evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing."

The *Jacobs* court held that it was not unfair or inappropriate to subject the defendant to impeachment by use of his priors when he did not testify. "Another party to the litigation should not be prevented from legitimate impeachment of damaging evidence because of [the defendant's] decision not to testify. . . . Here, appellant's potentially exculpatory out-of-court statement was admitted over objection by both the prosecution and his codefendant. Because appellant's factual claims about how he came into possession of the tools could not be challenged by way of cross-examination, their validity could only be challenged by way of an attack on appellant's credibility. In that context, the use of the priors was not unfair or inappropriate." (*Jacobs*, *supra*, 78 Cal.App.4th at p. 1451.)

The *Jacobs* court's analysis and conclusion was followed in *People v. Little* (2012) 206 Cal.App.4th 1364 (*Little*). In *Little*, the defendant had attended a real estate open house hosted by a realtor, who later discovered items missing from her purse, including two credit cards, which were then used at a Target store. (*Id.* at pp. 1367-1368, 1373.) When the defendant was pulled over by a police officer later that day, he told the officer that he had been coming from a church—i.e., not from the Target store. After the defense elicited the defendant's statement, the trial court allowed the prosecutor to impeach the defendant with a prior conviction. (*Id*. at p. 1374.)

The *Little* court explained why it was following *Jacobs* and holding that the trial court had properly allowed the impeachment: "If Little had testified, the prosecution could have challenged his credibility with prior conviction evidence under Evidence Code section 788. Instead of testifying, Little sought to bring in exculpatory alibi evidence via a hearsay declaration. Evidence Code section 1202 permitted the prosecution to challenge his credibility with prior conviction evidence, just as it would have been entitled to do if he had taken the witness stand and testified in open court that

he was in church at the time of the attempted credit card usage at the Target store." (*Little*, *supra*, 206 Cal.App.4th at p. 1375.)

In this case, defendant contends that the *Jacobs* analysis is not applicable because defendant did not seek to introduce his out-of-court statement for its truth but to impeach the officers.[2] The record does not support this claim. Defendant sought to have his statement admitted pursuant to Evidence Code section 356, and the trial court specifically admitted it on that ground after finding it was not a prior inconsistent statement of Officer McLean. Further, following the trial court's ruling, defendant's trial counsel did not withdraw her request to admit defendant's statement. Instead, defendant's trial counsel proceeded to elicit the statement from Officer Prim during her cross-examination. Rather than impeachment, the statement served primarily to substantively rebut the evidence that defendant possessed the methamphetamine. Thus, the trial court did not err by admitting the statement for its truth, and the trial court did not abuse its discretion by allowing the prosecutor to impeach defendant's credibility with his prior convictions.

C. Failure to Give Limiting Instruction

Defendant contends the trial court erred by failing to instruct the jury that defendant's prior convictions could not be used to infer criminal disposition or propensity. Defendant also contends his trial counsel was ineffective for failing to request such a limiting instruction.

1. Proceedings Below

During a conference concerning jury instructions, the parties agreed that the trial court would instruct the jury pursuant to "alternative B" of CALCRIM No. 316, regarding defendant's prior convictions. The trial court later gave the instruction as follows: "If you find that a witness has committed a crime or other misconduct, you may

[2] Below, defendant argued that his statement was admissible to impeach Officer McLean, but he did not argue that the statement was admissible to impeach Officer Prim.

consider that fact in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

The instruction given to defendant's jury did not include the optional word "only," which is in the standard instruction prior to the phrase "in evaluating the credibility of the witness's testimony." (See CALCRIM No. 316.[3])

2. Analysis

As defendant acknowledges, if a defendant fails to request an instruction on the limited admissibility of evidence, a trial court generally has no duty to give such an instruction. (See *People v. Maciel* (2013) 57 Cal.4th 482, 529; Evid. Code § 355 ["When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."].) Defendant contends that rule is inapplicable here, for several reasons.

Defendant first points out that the trial court indicated it would give a limiting instruction for the prior convictions. He acknowledges that the trial court did give CALCRIM No. 316, but he calls the instruction "flawed" because the trial court did not read the optional word "only" before the phrase "in evaluating the credibility of the witness's testimony." However, if defendant believed the instruction "required elaboration or clarification, he was obliged to request such elaboration or clarification in the trial court. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638.) Defendant's failure to request that the trial court include the word "only" forfeited the claim on appeal.

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[3] The bench notes accompanying CALCRIM No. 316 state: "If a felony conviction or other misconduct has been admitted only on the issue of credibility, give the bracketed word 'only.' "

Defendant next contends that he *did* request a limiting instruction. However, defendant requested an instruction in the context of requesting that his statement be admitted for impeachment. He did not specifically request an instruction concerning the prior convictions, and he did not specifically request that the trial court include the word "only" when it instructed the jury pursuant to CALCRIM No. 316.

Finally, defendant contends this case falls within the exception to the general rule that the trial court has no sua sponte duty to give a limiting instruction as to prior conviction evidence. In *People v. Collie* (1981) 30 Cal.3d 43 (*Collie*), the court observed, "There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence." (*Id.* at p. 64.)

The instant case is not an "extraordinary case" subject to the exception recognized in *Collie, supra,* 30 Cal.3d at page 64. The evidence of defendant's prior convictions was a very minor part of the evidence. Particularly because the prior conviction involving possession of methamphetamine was sanitized, the evidence was not "highly prejudicial." (*Ibid.*) And, as explained above and in the *Jacobs* case, under Evidence Code sections 788 and 1202, the evidence was relevant to impeach defendant's credibility.

3. Ineffective Assistance of Counsel

Defendant contends that if the trial court had no sua sponte duty to instruct the jury that the evidence of his prior convictions could only be used for impeachment, he received ineffective assistance from his trial counsel, who failed to request such an instruction—and failed to request that the trial court include the word "only" in CALCRIM No. 316.

Other cases have rejected claims of ineffective assistance based upon the failure to request a limiting instruction, finding that such instructions provide only "questionable benefits." (E.g., *People v. Maury* (2003) 30 Cal.4th 342, 394.) Here, the trial court instructed the jury, pursuant to CALCRIM No. 303, that "[d]uring the trial certain evidence was admitted for a limited purpose" and that the jury could "consider that evidence only for that purpose and for no other." Immediately after that instruction, the trial court instructed the jury, pursuant to CALCRIM No. 316, that it could consider defendant's prior convictions "in evaluating the credibility of the witness's testimony" and that it was up to the jurors to decide whether the prior convictions made defendant "less believable." The import of these instructions was that defendant's prior convictions could only be considered for determining credibility, and not for any other purpose. Thus, defendant's trial counsel may reasonably have concluded that it was not necessary to request a further limiting instruction.

Even assuming that reasonable trial counsel would have requested that the trial court give a more specific limiting instruction—i.e., one specifying that the jury could *only* use defendant's prior convictions in determining his credibility, it is not reasonably probable that the jury would not have convicted defendant. (See *Strickland, supra,* 466 U.S. at p. 694.) As given, the instructions indicated that defendant's prior convictions could be considered only as to defendant's credibility in denying possession of the methamphetamine. The prosecutor's closing argument reinforced that point: she referred to defendant's prior convictions of providing false information to the police only in the context of asserting that defendant was "not credible with police officers," and she referenced defendant's prior conviction of possession for sale of a controlled substance only when telling the jury that the conviction "[a]ffects on his believability when he initially denies that it[']s his." (See *People v. Farnam* (2002) 28 Cal.4th 107, 151 [prosecutor's argument to the jury reinforced the "correct import" of instruction regarding prior convictions].) Moreover, the evidence of defendant's guilt was

overwhelming. Defendant was the only person in the area in which the methamphetamine was found, he was seen making a motion as if discarding something in the area where the methamphetamine was found, and he was carrying a methamphetamine pipe. Although the two officers had different recollections of defendant's statements, their testimony was consistent regarding defendant's actions. On this record, it is not reasonably probable that the jury would have failed to convict defendant if his trial counsel had requested a limiting instruction that expressly restricted the jury from considering the evidence of his prior convictions as to issues other than his credibility. (See *Strickland*, *supra*, 466 U.S. at p. 694.)

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.